

## SECRETARIAL ORDER

### **American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act**

issued by the

**Department of the Interior  
&  
Department of Commerce**

**Sec. 1. Purpose and Authority.** This Order is issued by the Secretary of the Interior and the Secretary of Commerce (Secretaries) pursuant to the Endangered Species Act of 1973, 16 U.S.C. §1531, as amended, (the Act), the federal-tribal trust relationship, and other federal law. Specifically, this Order clarifies the responsibilities of the component agencies, bureaus and offices of the Department of the Interior and the Department of Commerce (Departments), when actions taken under authority of the Act and associated implementing regulations affect, or may affect, Indian lands, tribal trust resources, or the exercise of American Indian tribal rights, as defined in this Order. This Order further acknowledges the trust responsibility and treaty obligations of the United States toward Indian tribes and tribal members and its government-to-government relationship in dealing with tribes. Accordingly, the Departments will carry out their responsibilities under the Act in a manner that harmonizes the Federal trust responsibility to tribes, tribal sovereignty, and statutory missions of the Departments, and that strives to ensure that Indian tribes do not bear a disproportionate burden for the conservation of listed species, so as to avoid or minimize the potential for conflict and confrontation.

**Sec. 2. Scope and Limitations.** (A) This Order is for guidance within the Departments only and is adopted pursuant to, and is consistent with, existing law.

(B) This Order shall not be construed to grant, expand, create, or diminish any legally enforceable rights, benefits or trust responsibilities, substantive or procedural, not otherwise granted or created under existing law. Nor shall this Order be construed to alter, amend, repeal, interpret or modify tribal sovereignty, any treaty rights, or other rights of any Indian tribe, or to preempt, modify or limit the exercise of any such rights.

(C) This Order does not preempt or modify the Departments' statutory authorities or the authorities of Indian tribes or the states.

D) Nothing in this Order shall be applied to authorize direct (directed) take of listed species, or any activity that would jeopardize the continued existence of any listed species or destroy or adversely

modify designated critical habitat. Incidental take issues under this Order are addressed in Principle 3(C) of Section V.

(E) Nothing in this Order shall require additional procedural requirements for substantially completed Departmental actions, activities, or policy initiatives.

(F) Implementation of this Order shall be subject to the availability of resources and the requirements of the Anti-Deficiency Act.

(G) Should any tribe(s) and the Department(s) agree that greater efficiency in the implementation of this Order can be achieved, nothing in this Order shall prevent them from implementing strategies to do so.

(H) This Order shall not be construed to supersede, amend, or otherwise modify or affect the implementation of, existing agreements or understandings with the Departments or their agencies, bureaus, or offices including, but not limited to, memoranda of understanding, memoranda of agreement, or statements of relationship, unless mutually agreed by the signatory parties.

**Sec. 3. Definitions.** For the purposes of this Order, except as otherwise expressly provided, the following terms shall apply:

(A) The term “Indian tribe” shall mean any Indian tribe, band, nation, pueblo, community or other organized group within the United States which the Secretary of the Interior has identified on the most current list of tribes maintained by the Bureau of Indian Affairs.

(B) The term "tribal trust resources" means those natural resources, either on or off Indian lands, retained by, or reserved by or for Indian tribes through treaties, statutes, judicial decisions, and executive orders, which are protected by a fiduciary obligation on the part of the United States.

(C) The term "tribal rights" means those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and which give rise to legally enforceable remedies.

(D) The term “Indian lands” means any lands title to which is either: 1) held in trust by the United States for the benefit of any Indian tribe or individual; or 2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.

**Sec. 4. Background.** The unique and distinctive political relationship between the United States and Indian tribes is defined by treaties, statutes, executive orders, judicial decisions, and agreements, and differentiates tribes from other entities that deal with, or are affected by, the Federal government. This relationship has given rise to a special Federal trust responsibility, involving the legal responsibilities and obligations of the United States toward Indian tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights.

The Departments recognize the importance of tribal self-governance and the protocols of a government-to-government relationship with Indian tribes. Long-standing Congressional and Administrative policies promote tribal self-government, self-sufficiency, and self-determination, recognizing and endorsing the fundamental rights of tribes to set their own priorities and make decisions affecting their resources and distinctive ways of life. The Departments recognize and respect, and shall consider, the value that tribal traditional knowledge provides to tribal and federal land management decision making and tribal resource management activities. The Departments recognize that Indian tribes are governmental sovereigns; inherent in this sovereign authority is the power to make and enforce laws, administer justice, manage and control Indian lands, exercise tribal rights and protect tribal trust resources. The Departments shall be sensitive to the fact that Indian cultures, religions, and spirituality often involve ceremonial and medicinal uses of plants, animals, and specific geographic places.

Indian lands are not federal public lands or part of the public domain, and are not subject to federal public land laws. They were retained by tribes or were set aside for tribal use pursuant to treaties, statutes, judicial decisions, executive orders or agreements. These lands are managed by Indian tribes in accordance with tribal goals and objectives, within the framework of applicable laws.

Because of the unique government-to-government relationship between Indian tribes and the United States, the Departments and affected Indian tribes need to establish and maintain effective working relationships and mutual partnerships to promote the conservation of sensitive species (including candidate, proposed and listed species) and the health of ecosystems upon which they depend. Such relationships should focus on cooperative assistance, consultation, the sharing of information, and the creation of government-to-government partnerships to promote healthy ecosystems.

In facilitating a government-to-government relationship, the Departments may work with intertribal organizations, to the extent such organizations are authorized by their member tribes to carry out resource management responsibilities.

**Sec. 5. Responsibilities.** To achieve the objectives of this Order, the heads of all agencies, bureaus and offices within the Department of the Interior, and the Administrator of The National Oceanic and Atmospheric Administration (NOAA) within the Department of Commerce, shall be responsible for ensuring that the following directives are followed:

**Principle 1. THE DEPARTMENTS SHALL WORK DIRECTLY WITH INDIAN TRIBES ON A GOVERNMENT-TO-GOVERNMENT BASIS TO PROMOTE HEALTHY ECOSYSTEMS.**

The Departments shall recognize the unique and distinctive political and constitutionally based relationship that exists between the United States and each Indian tribe, and shall view tribal governments as sovereign entities with authority and responsibility for the health and welfare of ecosystems on Indian lands. The Departments recognize that Indian tribes are governmental sovereigns with inherent powers to make and enforce laws, administer justice, and manage and control their natural resources. Accordingly, the Departments shall seek to establish effective government-to-government working relationships with tribes to achieve the common goal of promoting and protecting the health of these ecosystems. Whenever the agencies, bureaus, and offices of the Departments are aware that their actions planned under the Act may impact tribal trust resources, the exercise of tribal rights, or Indian lands, they shall consult with, and seek the participation of, the affected Indian tribes to the maximum extent practicable. This shall include providing affected tribes adequate opportunities to participate in data collection, consensus seeking, and associated processes. To facilitate the government-to-government relationship, the Departments may coordinate their discussions with a representative from an intertribal organization, if so designated by the affected tribe(s).

Except when determined necessary for investigative or prosecutorial law enforcement activities, or when otherwise provided in a federal-tribal agreement, the Departments, to the maximum extent practicable, shall obtain permission from tribes before knowingly entering Indian reservations and tribally-owned fee lands for purposes of ESA-related activities, and shall communicate as necessary with the appropriate tribal officials. If a tribe believes this section has been violated, such tribe may file a complaint with the appropriate Secretary, who shall promptly investigate and respond to the tribe.

**Principle 2. THE DEPARTMENTS SHALL RECOGNIZE THAT INDIAN LANDS ARE NOT SUBJECT TO THE SAME CONTROLS AS FEDERAL PUBLIC LANDS.**

The Departments recognize that Indian lands, whether held in trust by the United States for the use and benefit of Indians or owned exclusively by an Indian tribe, are not subject to the controls or restrictions set forth in federal public land laws. Indian lands are not federal public lands or part of the public domain, but are rather retained by tribes or set aside for tribal use pursuant to treaties, statutes, court orders, executive orders, judicial decisions, or agreements. Accordingly, Indian tribes manage Indian lands in accordance with tribal goals and objectives, within the framework of applicable laws.

**Principle 3. THE DEPARTMENTS SHALL ASSIST INDIAN TRIBES IN DEVELOPING AND EXPANDING TRIBAL PROGRAMS SO THAT HEALTHY ECOSYSTEMS ARE PROMOTED AND CONSERVATION RESTRICTIONS ARE UNNECESSARY.**

**(A) The Departments shall take affirmative steps to assist Indian tribes in developing and expanding tribal programs that promote healthy ecosystems.**

The Departments shall take affirmative steps to achieve the common goals of promoting healthy ecosystems, Indian self-government, and productive government-to-government relationships under this Order, by assisting Indian tribes in developing and expanding tribal programs that promote the health of ecosystems upon which sensitive species (including candidate, proposed and listed species) depend.

The Departments shall offer and provide such scientific and technical assistance and information as may be available for the development of tribal conservation and management plans to promote the maintenance, restoration, enhancement and health of the ecosystems upon which sensitive species (including candidate, proposed, and listed species) depend, including the cooperative identification of appropriate management measures to address concerns for such species and their habitats.

**(B) The Departments shall recognize that Indian tribes are appropriate governmental entities to manage their lands and tribal trust resources.**

The Departments acknowledge that Indian tribes value, and exercise responsibilities for, management of Indian lands and tribal trust resources. In keeping with the federal policy of promoting tribal self-government, the Departments shall respect the exercise of tribal sovereignty over the management of Indian lands, and tribal trust resources. Accordingly, the Departments shall give deference to tribal conservation and management plans for tribal trust resources that: (a) govern activities on Indian lands, including, for the purposes of this section, tribally-owned fee lands, and (b) address the conservation needs of listed species. The Departments shall conduct government-to-government consultations to discuss the extent to which tribal resource management plans for tribal trust resources outside Indian lands can be incorporated into actions to address the conservation needs of listed species.

**(C) The Departments, as trustees, shall support tribal measures that preclude the need for conservation restrictions.**

At the earliest indication that the need for federal conservation restrictions is being considered for any species, the Departments, acting in their trustee capacities, shall promptly notify all potentially affected tribes, and provide such technical, financial, or other assistance as may be appropriate, thereby assisting Indian tribes in identifying and implementing tribal conservation and other measures necessary to protect such species.

In the event that the Departments determine that conservation restrictions are necessary in order to protect listed species, the Departments, in keeping with the trust responsibility and government-to-government relationships, shall consult with affected tribes and provide written notice to them of the intended restriction as far in advance as practicable. If the proposed conservation restriction is directed at a tribal activity that could raise the potential issue of direct (directed) take under the Act, then meaningful government-to-government consultation shall occur, in order to strive to harmonize the federal trust responsibility to tribes, tribal sovereignty and the statutory missions of the Departments. In cases involving an activity that could raise the potential issue of an incidental take under the Act, such notice shall include an analysis and determination that all of the following conservation standards have been met: (i) the restriction is reasonable and necessary for conservation of the species at issue; (ii) the conservation purpose of the restriction cannot be achieved by reasonable regulation of non-Indian activities; (iii) the measure is the least restrictive alternative available to achieve the required conservation purpose; (iv) the restriction does not discriminate against Indian activities, either as stated or applied; and, (v) voluntary tribal measures are not adequate to achieve the necessary conservation purpose.

**Principle 4. THE DEPARTMENTS SHALL BE SENSITIVE TO INDIAN CULTURE, RELIGION AND SPIRITUALITY.**

The Departments shall take into consideration the impacts of their actions and policies under the Act on Indian use of listed species for cultural and religious purposes. The Departments shall avoid or minimize, to the extent practicable, adverse effects upon the noncommercial use of listed sacred plants and animals in medicinal treatments and in the expression of cultural and religious beliefs by Indian tribes. When appropriate, the Departments may issue guidelines to accommodate Indian access to, and traditional uses of, listed species, and to address unique circumstances that may exist when administering the Act.

**Principle 5. THE DEPARTMENTS SHALL MAKE AVAILABLE TO INDIAN TRIBES INFORMATION RELATED TO TRIBAL TRUST RESOURCES AND INDIAN LANDS, AND, TO FACILITATE THE MUTUAL EXCHANGE OF INFORMATION, SHALL STRIVE TO PROTECT SENSITIVE TRIBAL INFORMATION FROM DISCLOSURE.**

To further tribal self-government and the promotion of healthy ecosystems, the Departments recognize the critical need for Indian tribes to possess complete and accurate information related to Indian lands and tribal trust resources. To the extent consistent with the provisions of the Privacy Act, the Freedom of Information Act (FOIA) and the Departments' abilities to continue to assert FOIA exemptions with regard to FOIA requests, the Departments shall make available to an Indian tribe all information held by the Departments which is related to its Indian lands and tribal trust resources. In the course of the mutual exchange of information, the Departments shall protect, to the maximum extent practicable, tribal information which has been disclosed to or collected by the Departments. The Departments shall promptly notify and, when appropriate, consult with affected tribes regarding all requests for tribal information relating to the administration of the Act.

**Sec. 6. Federal-Tribal Intergovernmental Agreements.** The Departments shall, when appropriate and at the request of an Indian tribe, pursue intergovernmental agreements to formalize arrangements involving sensitive species (including candidate, proposed, and listed species) such as, but not limited to, land and resource management, multi-jurisdictional partnerships, cooperative law enforcement, and guidelines to accommodate Indian access to, and traditional uses of, natural products. Such agreements shall strive to establish partnerships that harmonize the Departments' missions under the Act with the Indian tribe's own ecosystem management objectives.

**Sec. 7. Alaska.** The Departments recognize that section 10(e) of the Act governs the taking of listed species by Alaska Natives for subsistence purposes and that there is a need to study the implementation of the Act as applied to Alaska tribes and natives. Accordingly, this Order shall not apply to Alaska and the Departments shall, within one year of the date of this Order, develop recommendations to the Secretaries to supplement or modify this Order and its Appendix, so as to guide the administration of the Act in Alaska. These recommendations shall be developed with the full cooperation and participation of Alaska tribes and natives. The purpose of these recommendations shall be to harmonize the government-to-government relationship with Alaska tribes, the federal trust responsibility to Alaska tribes and Alaska Natives, the rights of Alaska Natives, and the statutory missions of the Departments.

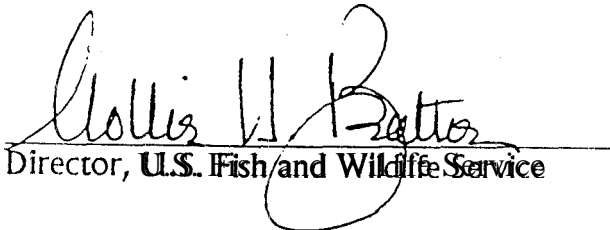
**Sec. 8. Special Study on Cultural and Religious Use of Natural Products.** The Departments recognize that there remain tribal concerns regarding the access to, and uses of, eagle feathers, animal parts, and other natural products for Indian cultural and religious purposes. Therefore, the Departments shall work together with Indian tribes to develop recommendations to the Secretaries within one year to revise or establish uniform administrative procedures to govern the possession, distribution, and transportation of such natural products that are under federal jurisdiction or control.

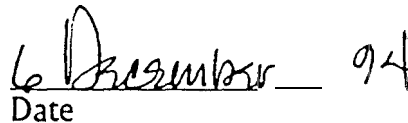
**Sec. 9. Dispute Resolution.** (A) Federal-tribal disputes regarding implementation of this Order shall be addressed through government-to-government discourse. Such discourse is to be respectful of government-to-government relationships and relevant federal-tribal agreements, treaties, judicial decisions, and policies pertaining to Indian tribes. Alternative dispute resolution processes may be employed as necessary to resolve disputes on technical or policy issues within statutory time frames; provided that such alternative dispute resolution processes are not intended to apply in the context of investigative or prosecutorial activities.

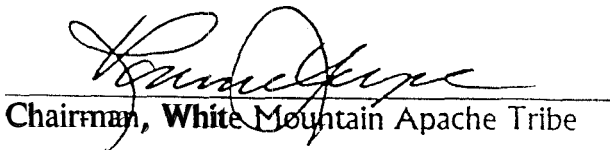
(B) Questions and concerns on matters relating to the use or possession of listed plants or listed animal parts used for religious or cultural purposes shall be referred to the appropriate Departmental officials and the appropriate tribal contacts for religious and cultural affairs.

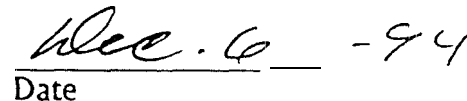
incorporation into the Tribal Management Plan (TMP), which consists of the portions of the Ecosystem Management Plan and integrated resource management plans which address sensitive species. This activity will initially take the form of lists of sensitive species, threats, and an assessment of commonality and severity of the threats.

- The Service will notify the Tribe upon initiation of formal or informal consultation with a Federal agency regarding tribal lands as soon as it becomes aware of a request.
- Active management and implementation of the **TMP** will generally serve as the basis for Reasonable and Prudent Measures and Alternatives arising from **formal** or informal consultations with Federal agencies.
- The Service and the Tribe will hold an annual conference on the **TMP** and its implementation. The conference will be held to make year-to-year **changes** and will **include field** visits and requests for future technical assistance.
- Adoption and implementation of the **TMP** will normally mean no **additional** special management considerations or protection for sensitive species will be **needed**.

  
Director, U.S. Fish and Wildlife Service

  
Date

  
Chairman, White Mountain Apache Tribe

  
Date



## APPENDIX

### *Appendix to Secretarial Order issued within the Department of the Interior as Order No. 3206*

**Sec. 1. Purpose.** The purpose of this Appendix is to provide policy to the National, regional and field offices of the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (hereinafter “Services”) concerning the implementation of the Secretarial Order of the Department of the Interior and the Department of Commerce, entitled “American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act.” This policy furthers the objectives of the FWS Native American Policy (June 28, 1994), and the American Indian and Alaska Native Policy of the Department of Commerce (March 30, 1995). This Appendix shall be considered an integral part of the above Secretarial Order, and all sections of the Order apply in their entirety to this Appendix.

**Sec. 2. General Policy.** (A) **Goals.** The goals of this Appendix are to provide a basis for administration of the Act in a manner that (1) recognizes common tribal-federal goals of conserving sensitive species (including candidate, proposed, and listed species) and the ecosystems upon which they depend, Indian self-government, and productive government-to-government relationships; and (2) harmonizes the federal trust responsibility to tribes, tribal sovereignty, and the statutory missions of the Departments, so as to avoid or minimize the potential for conflict and confrontation.

(B) **Government-to-Government Communication.** It shall be the responsibility of each Service's regional and field offices to maintain a current list of tribal contact persons within each Region, and to ensure that meaningful government-to-government communication occurs regarding actions to be taken under the Act.

(C) **Agency Coordination.** The Services have the lead roles and responsibilities in administering the Act, while the Services and other federal agencies share responsibilities for honoring Indian treaties and other sources of tribal rights. The Bureau of Indian Affairs (BIA) has the primary responsibility for carrying out the federal responsibility to administer tribal trust property and represent tribal interests during formal Section 7 consultations under the Act. Accordingly, the Services shall consult, as appropriate, with each other, affected Indian tribes, the BIA, the Office of the Solicitor (Interior), the Office of American Indian Trust (Interior), and the NOAA Office of General Counsel in determining how the fiduciary responsibility of the federal government to Indian tribes may best be realized.

(D) **Technical Assistance.** In their roles as trustees, the Services shall offer and provide technical assistance and information for the development of tribal conservation and management plans to promote the maintenance, restoration, and enhancement of the ecosystems upon which sensitive species (including candidate, proposed, and listed species), depend. The Services should be creative in working with the tribes to accomplish these objectives. Such technical assistance may include the cooperative identification of appropriate management measures to address

concerns for sensitive species (including candidate, proposed and listed species) and their habitats. Such cooperation may include intergovernmental agreements to enable Indian tribes to more fully participate in conservation programs under the Act. Moreover, the Services may enter into conservation easements with tribal governments and enlist tribal participation in incentive programs.

**(E) Tribal Conservation Measures.** The Services shall, upon the request of an Indian tribe or the BIA, cooperatively review and assess tribal conservation measures for sensitive species (including candidate, proposed and listed species) which may be included in tribal resource management plans. The Services will communicate to the tribal government their desired conservation goals and objectives, as well as any technical advice or suggestions for the modification of the plan to enhance its benefits for the conservation of sensitive species (including candidate, proposed and listed species). In keeping with the Services' initiatives to promote voluntary conservation partnerships for listed species and the ecosystems upon which they depend, the Services shall consult on a government-to-government basis with the affected tribe to determine and provide appropriate assurances that would otherwise be provided to a non-Indian.

### **Sec. 3. The Federal Trust Responsibility and the Administration of the Act.**

The Services shall coordinate with affected Indian tribes in order to fulfill the Services' trust responsibilities and encourage meaningful tribal participation in the following programs under the Act, and shall:

#### **(A) Candidate Conservation.**

- (1) Solicit and utilize the expertise of affected Indian tribes in evaluating which animal and plant species should be included on the list of candidate species, including conducting population status inventories and geographical distribution surveys;
- (2) Solicit and utilize the expertise of affected Indian tribes when designing and implementing candidate conservation actions to remove or alleviate threats so that the species' listing priority is reduced or listing as endangered or threatened is rendered unnecessary; and
- (3) Provide technical advice and information to support tribal efforts and facilitate voluntary tribal participation in implementation measures to conserve candidate species on Indian lands.

#### **(B) The Listing Process.**

- (1) Provide affected Indian tribes with timely notification of the receipt of petitions to list species, the listing of which could affect the exercise of tribal rights or the use of tribal trust resources. In addition, the Services shall solicit and utilize the expertise of affected Indian tribes in responding to listing petitions that may affect tribal trust resources or the exercise of tribal rights.

(2) Recognize the right of Indian tribes to participate fully in the listing process by providing timely notification to, soliciting information and comments from, and utilizing the expertise of, Indian tribes whose exercise of tribal rights or tribal trust resources could be affected by a particular listing. This process shall apply to proposed and final rules to: (i) list species as endangered or threatened; (ii) designate critical habitat; (iii) reclassify a species from endangered to threatened (or vice versa); (iv) remove a species from the list; and (v) designate experimental populations.

(3) Recognize the contribution to be made by affected Indian tribes, throughout the process and prior to finalization and close of the public comment period, in the review of proposals to designate critical habitat and evaluate economic impacts of such proposals with implications for tribal trust resources or the exercise of tribal rights. The Services shall notify affected Indian tribes and the BIA, and solicit information on, but not limited to, tribal cultural values, reserved hunting, fishing, gathering, and other Indian rights or tribal economic development, for use in: (i) the preparation of economic analyses involving impacts on tribal communities; and (ii) the preparation of “balancing tests” to determine appropriate exclusions from critical habitat and in the review of comments or petitions concerning critical habitat that may adversely affect the rights or resources of Indian tribes.

(4) In keeping with the trust responsibility, shall consult with the affected Indian tribe(s) when considering the designation of critical habitat in an area that may impact tribal trust resources, tribally-owned fee lands, or the exercise of tribal rights. Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species. In designating critical habitat, the Services shall evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands.

(5) When exercising regulatory authority for threatened species under section 4(d) of the Act, avoid or minimize effects on tribal management or economic development, or the exercise of reserved Indian fishing, hunting, gathering, or other rights, to the maximum extent allowed by law.

(6) Having first provided the affected Indian tribe(s) the opportunity to actively review and comment on proposed listing actions, provide affected Indian tribe(s) with a written explanation whenever a final decision on any of the following activities conflicts with comments provided by an affected Indian tribe: (i) list a species as endangered or threatened; (ii) designate critical habitat; (iii) reclassify a species from endangered to threatened (or vice versa); (iv) remove a species from the list; or (v) designate experimental populations. If an affected Indian tribe petitions for rulemaking under Section 4(b)(3), the Services will consult with and provide a written explanation to the affected tribe if they fail to adopt the requested regulation.

**(C) ESA §7 Consultation.**

(1) Facilitate the Services' use of the best available scientific and commercial data by soliciting information, traditional knowledge, and comments from, and utilizing the expertise of, affected Indian tribes in addition to data provided by the action agency during the consultation process. The Services shall provide timely notification to affected tribes as soon as the Services are aware that a proposed federal agency action subject to formal consultation may affect tribal rights or tribal trust resources.

(2) Provide copies of applicable final biological opinions to affected tribes to the maximum extent permissible by law.

(3)(a) When the Services enter formal consultation on an action proposed by the BIA, the Services shall consider and treat affected tribes as license or permit applicants entitled to full participation in the consultation process. This shall include, but is not limited to, invitation to meetings between the Services and BIA, opportunities to provide pertinent scientific data and to review data in the administrative record, and to review biological assessments and draft biological opinions. In keeping with the trust responsibility, tribal conservation and management plans for tribal trust resources that govern activities on Indian lands, including for purposes of this paragraph, tribally-owned fee lands, shall serve as the basis for developing any reasonable and prudent alternatives, to the extent practicable.

(b) When the Services enter into formal consultations with an Interior Department agency other than the BIA, or an agency of the Department of Commerce, on a proposed action which may affect tribal rights or tribal trust resources, the Services shall notify the affected Indian tribe(s) and provide for the participation of the BIA in the consultation process.

(c) When the Services enter into formal consultations with agencies not in the Departments of the Interior or Commerce, on a proposed action which may affect tribal rights or tribal trust resources, the Services shall notify the affected Indian tribe(s) and encourage the action agency to invite the affected tribe(s) and the BIA to participate in the consultation process.

(d) In developing reasonable and prudent alternatives, the Services shall give full consideration to all comments and information received from any affected tribe, and shall strive to ensure that any alternative selected does not discriminate against such tribe(s). The Services shall make a written determination describing (i) how the selected alternative is consistent with their trust responsibilities, and (ii) the extent to which tribal conservation and management plans for affected tribal trust resources can be incorporated into any such alternative.

#### **(D) Habitat Conservation Planning.**

(1) Facilitate the Services' use of the best available scientific and commercial data by soliciting information, traditional knowledge, and comments from, and utilizing the expertise of affected tribal governments in habitat conservation planning that may affect tribal trust resources or the exercise of tribal rights. The Services shall facilitate tribal participation by providing timely notification as soon as the Services are aware that a draft Habitat Conservation Plan (HCP) may affect such resources or the exercise of such rights.

(2) Encourage HCP applicants to recognize the benefits of working cooperatively with affected Indian tribes and advocate for tribal participation in the development of HCPs. In those instances where permit applicants choose not to invite affected tribes to participate in those negotiations, the Services shall consult with the affected tribes to evaluate the effects of the proposed HCP on tribal trust resources and will provide the information resulting from such consultation to the HCP applicant prior to the submission of the draft HCP for public comment. After consultation with the tribes and the non-federal landowner and, after careful consideration of the tribe's concerns, the Services must clearly state the rationale for the recommended final decision and explain how the decision relates to the Services' trust responsibility.

(3) Advocate the incorporation of measures into HCPs that will restore or enhance tribal trust resources. The Services shall advocate for HCP provisions that eliminate or minimize the diminishment of tribal trust resources. The Services shall be cognizant of the impacts of measures incorporated into HCPs on tribal trust resources and the tribal ability to utilize such resources.

(4) Advocate and encourage early participation by affected tribal governments in the development of region-wide or state-wide habitat conservation planning efforts and in the development of any related implementation documents.

#### **(E) Recovery.**

(1) Solicit and utilize the expertise of affected Indian tribes by having tribal representation, as appropriate, on Recovery Teams when the species occurs on Indian lands (including tribally-owned fee lands), affects tribal trust resources, or affects the exercise of tribal rights, and

(2) In recognition of tribal rights, cooperate with affected tribes to develop and implement Recovery Plans in a manner that minimizes the social, cultural and economic impacts on tribal communities, consistent with the timely recovery of listed species. The Services shall be cognizant of tribal desires to attain population levels and conditions that are sufficient to support the meaningful exercise of reserved rights and the protection of tribal management or development prerogatives for Indian resources.

(3) Invite affected Indian tribes, or their designated representatives, to participate in the Recovery Plan implementation process through the development of a participation plan, and through tribally-designated membership on recovery teams. The Services will work cooperatively with affected Indian tribes to identify and implement the most effective measures to speed the recovery process.

(4) Solicit and utilize the expertise of affected Indian tribes in the design of monitoring programs for listed species and for species which have been removed from the list of *Endangered and Threatened Wildlife and Plants* occurring on Indian lands or affecting the exercise of tribal rights or tribal trust resources.

**(F) Law Enforcement.**

(1) At the request of an Indian tribe, enter into cooperative law enforcement agreements as integral components of tribal, federal, and state efforts to conserve species and the ecosystems upon which they depend. Such agreements may include the delegation of enforcement authority under the Act, within limitations, to full-time tribal conservation law enforcement officers.

(2) Cooperate with Indian tribes in enforcement of the Act by identifying opportunities for joint enforcement operations or investigations. Discuss new techniques and methods for the detection and apprehension of violators of the Act or tribal conservation laws, and exchange law enforcement information in general.

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## Questions & Answers

Secretarial Order No. \_\_\_\_\_

**1. What is the purpose of this new Secretarial Order for implementing the Endangered Species Act (ESA)?**

This Secretarial Order clarifies responsibilities of the Departments of Commerce and the Interior when the implementation of the ESA affects (or may affect) Indian lands, tribal trust resources, or the exercise of tribal rights.

**2. What is the Federal trust responsibility to Indian tribes?**

The Federal government maintains a special trust relationship with Indian tribes pursuant to treaties, statutes, Executive Orders, judicial decisions and other legal instruments. Inherent in this relationship is an enforceable fiduciary responsibility to Indian tribes to protect their lands and resources, unless otherwise unencumbered through mutual agreement.

**3. How much land does the Federal government hold in trust for Indian people:?**

95 million acres are held in trust by the Federal government.

**4. The Secretarial Order applies only to Federally-recognized tribes. How many Federally-rec:ognized tribes are there?**

The Secretary of the Interior has recognized 555 tribes for special status with the Department of the Interior.

**5. What is meant by a government-to-government relationship?**

The President's executive memorandum' of April 29, 1994, requires the Federal government to recognize tribal governments as the governments of separate, sovereign nations. This relationship is unique as the Federal government does not owe any other entity, state or private, a trust responsibility.

**6. What role did the Indian community have in the development of this Order'?**

Various representatives were designated by the Indian community to be part of the tribal negotiation team that developed the final Order. While it was impossible to include all tribes in the negotiation process, both the Federal and tribal participants felt that the Indian community was well represented in this process. In addition, the Fish & Wildlife Service included its Native American Liaison and the Bureau of Indian Affairs was represented by its Deputy Assistant Secretary for Indian Affairs in these negotiations.

**7. By their participation in the development of this Order, are the tribes now acknowledging that the ESA applies to them?**

**No.** 'The tribes acknowledge that the ESA is administered by the Fish & Wildlife Service and NMFS. In their administration of the Act, the Services must, on occasion, deal with Indian tribes. By participating in the development of this Order, the tribes were seeking to ensure that tribal sovereignty, tribal rights and the Federal trust responsibility to Indian people receive full and fair recognition in the implementation of the ESA. Both the Federal team and the tribal acknowledged that species conservation could be best achieved through government-to-government collaboration and communication rather than through litigation.

**8. If tribal governments and the Services still have different views regarding the effect of the ESA upon tribal rights, what really 'has been accomplished by this Secretariat Order'?**

The long-standing legal disagreement regarding the application of the ESA to treaty rights has often created a barrier to closer cooperation between the Federal government and tribes on endangered species conservation. By agreeing to set aside their legal differences and focus on the mutual goals of maintaining and restoring healthy ecosystems and promoting species conservation, the Services and tribal governments have forged a new conservation partnership that will ultimately benefit both endangered trust resources and the exercise of treaty rights.

**9. Isn't there an inherent conflict between the Services' trust responsibility to the tribes and their statutory responsibility to administer the ESA?**

As trustees, the Services are obligated to ensure that tribal trust resources and tribal lands are protected to the maximum extent practicable within the law. Some of those same trust resources may be afforded protection under the ESA. Thus, the Services view their responsibilities under the ESA to restore and conserve endangered species as supportive of, and consistent with, their responsibilities as trustees to Indian people.



10. The Order, in its Purpose,, states that the Departments will ensure that "Indian tribes do not bear a disproportionate burden for the conservation of listed species . . ." Does that imply that someone else will share a "disproportionate burden?"

No. The Order implies that no one should carry a disproportionate burden and that the Act should be implemented fairly and consistently for all Americans, including Native Americans.

11. Will this Order somehow circumvent the requirements of the Act in favor of Indian tribes:?

No. The Order plainly states that it shall not be construed to grant, expand, create or diminish any legally enforceable rights, benefits or trust responsibilities not otherwise granted or created under existing law. The Order also states that it does not preempt or modify the Department's statutory authorities and is consistent with existing law.

12. Will government-to-government consultation always require that the Departments consult with each individual tribe whenever an ESA activity impacts, or may impact, tribal lands or resources?

Not necessarily. The Order allows Indian tribes to use intertribal organizations to speak for tribes, at the tribes' behest, in certain matters. For instance, the NW Indian Fisheries Commission may speak for a number of tribes in the northwest.

13. Why aren't "Indian lands" considered part of the Federal land base---doesn't the Federal government have responsibility for these lands?

Indian lands are designated as such by virtue of Indian treaties, statutes, court orders, Executive Orders, judicial decisions or other agreements. They are not considered part of the Federal land base because the Federal government only holds these lands in trust for Indian tribes and Indian individuals. They are, rather, considered part of the "Indian land base" over which the Federal government maintains a fiduciary responsibility of protection.

14. What is meant by "deference" to tribal conservation management plans for Indian lands?

The Departments recognize that Indian tribes value and take responsibility for the management of their lands and resources. Deference will be given to those tribal conservation plans that a) speak to those activities on Indian lands (including tribally--owned fee lands) and b) address the conservation needs of the listed species. In other words, if the tribe has a conservation plan that addresses the concerns of the Departments for a particular listed

species----even if it was not specifically developed for that species----the plan will be given deference. There would be no expectation or requirement for the tribe to develop an alternative plan.

**15. Will this same "deference" apply to tribal trust resources management plans for off--reservation resources?**

The degree of deference to tribal management plans for off-reservation tribal trust resources will depend upon the extent to which such plans address the Departments' concerns. This will be ascertained through a government-to-government consultation where all concerns and plans are "put on the table" for review.

**16. Does this Order authorize the "direct take" of listed species by Indian tribes?**

No. the Order does not override the statutory provisions of the Act, including the prohibition against direct take. Whenever a situation arises that may raise the possible issue of direct take, a government-to-government consultation will occur to ascertain the appropriate action to take given the statutory mission of the Departments, the Federal trust responsibility and the role of sovereignty.

**17. Under what circumstances will the "incidental" take of listed species be allowed?**

A series of Supreme Court decisions in the 1960's and 1970's established a 5-prong test that needed to be satisfied before state conservation measures could be applied to restrict treaty hunting and fishing rights. Eventually known as the "5 conservation necessity principles", this 5-prong test was adopted as Federal policy for applying incidental take restrictions under the ESA to tribal treaty rights and was cited in the settlement of U.S. v. Oregon 699 F.Supp. 1456 (1988). The Secretarial Order restates this Federal enforcement policy as applied to incidental take of listed species. Accordingly, an analysis and determination must be made that all the following standards have been met: (i) the restriction is reasonable and necessary for conservation of the species at issue; (ii) the conservation purpose of the restriction cannot be achieved by reasonable regulation of non-Indian activities; (iii) the measure is the least restrictive alternative available to achieve the required conservation purpose; (iv) the restriction does not discriminate against Indian activities, either as stated or applied; and, (v) voluntary tribal measures are not adequate to achieve the necessary conservation purpose. Therefore, conservation restrictions may be imposed on Indian tribes only when all 5 standards have been met.

18. Will the implementation of this Order in any way disturb the intergovernmental agreements already in place or those nearing completion after (sometimes) years of negotiation?

No. The Order specifically states that it will not supersede, amend, or otherwise modify or affect the implementation of agreements or understandings already in place unless both parties agree otherwise.

19. Alaska Natives are not included in the Order. What accommodations are being for Alaska Natives?

Alaska Natives were not included in the Order because there was a concern that their subsistence exemption under 10(e) of the Act might be otherwise impacted. However, the Departments have agreed to make an independent study of the Alaska Native situation within one year of the signing of the Order.

20. Will this Order make access to eagle feather arty easier for Native American religious practitioners?

The Departments recognized the tribal concerns for better and quicker access to eagle feathers and other species that may be sacred to them. The Order, 'therefore, makes a commitment to convene another Federal/tribal working group to address the issue in some detail and make recommendations to the Secretaries of the Interior and Commerce accordingly. It was felt that this issue was of sufficient importance on its own to warrant an independent study of the matter, rather than try to address it specifically in the body of the Order.

21. Are the Departments setting aside monies to fund the effort to consult with Indian tribes on ESA matters?

Until such time as funds may be appropriated for Federal consultation efforts, including efforts on other Indian-related issues, the Departments will encourage their Regional and field offices to provide on-the-ground technical assistance to the tribes in the form of personnel, machinery,, research tools and information exchanges. It is anticipated that the tribes will contribute to this effort in similar fashion to forge effective consultations.

22. Does the Order provide for any proactive ESA related activities with Indian tribes?

Upon the tribes' request, the Services may review and assess tribal conservation plans and other measures for conserving sensitive species. This type of proactive consultation will allow the Services to become better acquainted with tribal positions and sensitivities and, consequently, allow the tribes a greater presence in the ESA activities of the Services.

23. The Appendix of the Order goes to some length to state that Indian tribes will be given prompt notification of petitions, (opportunities to participate in the ESA activity, ability to provide information, etc. How is this any different from the opportunities that are afforded the general public in this process?

Through government-to-government protocols, the Services will make a special effort to include the affected tribes in significant ways in the ESA process. Face-to-face meetings would be standard protocol---not notices in the newspapers or other postings. The Services would solicit tribal information not only on the species at issue but on tribal cultural values, hunting, fishing, and gathering rights, a review of treaty obligations, and impacts on tribal economy.

24. Will there be any change in the way the Services designate critical habitat with respect to Indian lands?

Critical habitat shall not be designated on Indian lands unless it is determined essential to conserve a listed species. The Services believe that this is consistent with the special trust responsibility the Federal government has to Indian people to preserve and protect their lands and resources.

25. Does tribal involvement in the 57 consultation process have any impact; on the development of reasonable and prudent ialternatives? \*

The development of reasonable and prudent alternatives will be scientifically based. However, the affected tribes will be allowed to provide pertinent information and viewpoints that would enable the Services to develop informed reasonable and prudent alternatives.

26. With respect to 57 consultations, explain the various mechanisms the Services would employ to elicit pertinent information from the affected tribes.

When the consultation is with the BIA, the affected tribes will be considered as license or permit applicants and participate in the consultation as such. When the consultation is with some 'other Interior or Commerce agency, the Departments will provide for the participation of the BIA. With the participation of the BIA, the tribes at least have a spokesperson to represent their interests, even though they may not be "at the table." When the consultation is with an out-side agency, the tribes will be notified of such consultation and the outside agency will be encouraged to include the BIA and affected tribes in the process.

27. In soliciting the tribes for information in the various ESA processes,, mention is made of "traditional knowledge." To what extent will this traditional knowledge be used in developing recommendations, plans of action,, or opinions that should be based on the! best scientific evidence available?

The use of the best scientific evidence available does not preclude the consideration of other factors that would shed light on the scientific evidence at hand. For instance, the scientific data available might refer generally to a particular behavior pattern of a species. Traditional knowledge might inform the Services on the times, seasons, conditions, etc., of such behavior pattern which has been observed since time immemorial by an Indian tribe. The Services would find this information useful in evaluating their scientific evidence.

28. Will Indian tribes have any input into the habitat conservation plans (HCPs) that are developed by private landowners or local governments?

The Order allows for the use of information provided by the affected tribes in HCPs. While this will not require that HCP applicants include the tribes in actual negotiations, the Services will take full advantage of the information provided by the tribes through formal submissions and during the public comment process. The Services will share this information with the HCP applicants and advocate incorporation of measures into HCPs that will restore or enhance tribal trust resources.

# STATEMENT of the Relationship between the WHITE MOUNTAIN APACHE TRIBE and the US FISH AND WILDLIFE SERVICE,

## **PURPOSE**

Tribal sovereignty and Service legal mandates, as applied by the Service, have appeared to conflict in the past, but both the Tribe and the Service believe that a-working relationship that reconciles the two within a bilateral government-to-government framework will reduce the potential for future conflicts.

## **I. GUIDING PRECEPTS**

- The Tribe and the Service have a common interest in promoting healthy ecosystems.
- The Service recognizes the Tribe's aboriginal rights, sovereign authority, and institutional capacity to self-manage the lands and resources within the Fort-Apache Indian Reservation as the self-sustaining homeland of the White Mountain Apache people.
- The Service's technical expertise in fish, wildlife, and plants establishes it as a significant resource for the Tribe's management of the ecosystems and associated sensitive species of the Reservation.
- The Service has a trust responsibility and is required to consult with the Tribe, as articulated in Order No. 3175 by the Secretary of the Interior, regarding any of its activities that may affect the Tribe's trust resources and the sustained yield of those resources. Such activities will support the Tribe's self-determination and economic self-sufficiency.

- The Tribe and the Service acknowledge that delays in communication as well as unclear lines of communication have led to problems in the past. The Tribe and the Service agree that clarification of this issue through implementation of the concepts contained in this statement will ensure early two-way interactions and will lead to productive resolution of issues of mutual concern.
- The Tribe and the Service agree and recognize that this statement and any process established by it do not preempt or modify the respective rights and responsibilities of either entity.

## 11. TRIBAL MANAGEMENT

- The Tribe is continuing to institutionalize internal processes for planning, review, regulation, and enforcement to ensure that economic activity on its reservation is consistent with traditional Apache values for living in balance with the natural world.
- The Tribe will complete integrated resource management plans on a watershed basis that promote tribal goals, including sustained yield. These plans will direct the assessment, management, and restoration of ecosystems in accordance with tribal values. Other tribal resource management plans must conform to the conservation guidelines and practices established in the integrated resource management plans.
- In the interim, the Tribe is preparing an Ecosystem Management Plan that addresses sensitive species, based on existing knowledge, active conservation practices, and current management plans. The plan will be continuously enhanced with new information obtained from ongoing surveys, habitat assessments, and other planning processes.

## III. COMMUNICATION

- The government-to-government relationship requires working with the White Mountain Apache Tribal Government and its resource management authorities, including the sharing of technical staffs and information, to address issues of mutual interest and common concern. Both the Tribe and the Service recognize, however, that release of tribal proprietary, commercial, and confidential information may be restricted by either the Tribe or the Service.
- While the Tribe and the Service encourage open, informal discussion to facilitate proactive, cooperative efforts; formal communications follow the outline in Table 1.

## Presidential Documents

Executive Order 13007 of May 24, 1996

### Indian Sacred Sites

By the authority vested in me as President by the Constitution and the laws of the United States, in furtherance of Federal treaties, and in order to protect and preserve Indian religious practices, it is hereby ordered:

Section 1. *Accommodation of Sacred Sites.* (a) In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, agencies shall maintain the confidentiality of sacred sites.

(b) For purposes of this order:

(i) "Federal lands" means any land or interests in land owned by the United States, including leasehold interests held by the United States, except Indian trust lands;

(ii) "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to Public Law No. 103-454, 108 Stat. 4791, and "Indian" refers to a member of such an Indian tribe; and

(iii) "Sacred site" means any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.

Sec. 2. *Procedures.* (a) Each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, as appropriate, promptly implement procedures for the purposes of carrying out the provisions of section 1 of this order, including, where practicable and appropriate, procedures to ensure reasonable notice is provided of proposed actions or land management policies that may restrict future access to or ceremonial use of, or adversely affect the physical integrity of, sacred sites. In all actions pursuant to this section, agencies shall comply with the Executive memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments."

(b) Within 1 year of the effective date of this order, the head of each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall report to the President, through the Assistant to the President for Domestic Policy, on the implementation of this order. Such reports shall address, among other things, (i) any changes necessary to accommodate access to and ceremonial use of Indian sacred sites; (ii) any changes necessary to avoid adversely affecting the physical integrity of Indian sacred sites; and (iii) procedures implemented or proposed to facilitate consultation with appropriate Indian tribes and religious leaders and the expeditious resolution of disputes relating to agency action on Federal lands that may adversely affect access to, ceremonial use of, or the physical integrity of sacred sites.



Sec. 3. Nothing in this order shall be construed to require a taking of vested property interests. Nor shall this order be construed to impair enforceable rights to use of Federal lands that have been granted to third parties through final agency action. For purposes of this order, "agency action" has the same meaning as in the Administrative Procedure Act (5 U.S.C. 551(13)).

Sec. 4. This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies, officers, or any person.

A handwritten signature in black ink, reading "William J. Clinton". The signature is written in a cursive, flowing style with a large, prominent "W" and "C".

THE WHITE HOUSE,  
*May 24, 1996.*

[FR Doc. 96-13597  
Filed 5-27-96; 8:45 am]  
Billing code 3195-01-P

[Federal Register: May 4, 1994]

Presidential Documents

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Title 3--

The President

Memorandum of April 29, 1994

Government-to-Government Relations With Native American Tribal Governments

Memorandum for the Heads of Executive Departments and Agencies

The United States Government has a unique legal relationship with Native American tribal governments as set forth in the Constitution of the United States, treaties, statutes, and court decisions. As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty. Today, as part of an historic meeting, I am outlining principles that executive departments and agencies, including every component bureau and office, are to follow in their interactions with Native American tribal governments. The purpose of these principles is to clarify our responsibility to ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native American tribes. I am strongly committed to building a more effective day-to-day working relationship reflecting respect for the rights of self-government due the sovereign tribal governments.

In order to ensure that the rights of sovereign tribal governments are fully respected, executive branch activities shall be guided by the following:

- (a) The head of each executive department and agency shall be responsible for ensuring that the department or agency operates within a government-to-government relationship with federally recognized tribal governments.
- (b) Each executive department and agency shall consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments. All such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals.

- (c) Each executive department and agency shall assess the impact of Federal Government plans, projects, programs, and activities on tribal trust resources and assure that tribal government rights and concerns are considered during the development of such plans, projects, programs, and activities.
- (d) Each executive department and agency shall take appropriate steps to remove any procedural impediments to working directly and effectively with tribal governments on activities that affect the trust property and/or governmental rights of the tribes.
- (e) Each executive department and agency shall work cooperatively with other Federal departments and agencies to enlist their interest and support in cooperative efforts, where appropriate, to accomplish the goals of this memorandum.
- (f) Each executive department and agency shall apply the requirements of Executive Orders Nos. 12875 ("Enhancing the Intergovernmental Partnership") and 12866 ("Regulatory Planning and Review") to design solutions and tailor Federal programs, in appropriate circumstances, to address specific or unique needs of tribal communities.

The head of each executive department and agency shall ensure that the department or agency's bureaus and components are fully aware of this memorandum, through publication or other means, and that they are in compliance with its requirements.

This memorandum is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right to administrative or judicial review, or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

The Director of the Office of Management and Budget is authorized and directed to publish this memorandum in the Federal Register.

(Presidential Sig.)<Clinton1>><Clinton2>

THE WHITE HOUSE,

Washington, April 29, 1994.